

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN, UNDER ARBITRATION ACT. No 10 of 1999

For Approval and Signature:

Hon'ble ACTG.CHIEF JUSTICE MR. C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?

4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

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SIMMS ELECTRICALS & MECH.WORKS

Versus

BHARAT HEAVY ELECTRICALS LTD.

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Appearance:

MR PK JANI for Petitioner

MRS SASI V PARIKH for Respondent No. 1

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CORAM : ACTG.CHIEF JUSTICE MR. C.K.THAKKAR

Date of decision: 29/10/1999

ORAL JUDGEMENT

This petition is filed by the petitioner for appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

The case of the petitioner was that a request for appointment of arbitrator was made. Relevant clause of

the contract reads as under :

"Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the work or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of BHEL and if General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the General Manager, willing to act as such arbitrator.

The cases referred to arbitration shall be other than those for which the decision of the accepting officer, or engineer in charge as the case may be is expressed in the contract to be final and conclusive. There will be no objection if the arbitrator so appointed is an employee of BHEL and that he had to deal with the matters to which the contract relates and that in the course of this duties as such had expressed views on all or any of the matters in dispute or difference.

The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such General Manager as aforesaid at the time of such transfer, vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or reenactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of contract that the party involving arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

The work under the contract shall, if reasonably possible, continue, during the arbitration proceedings and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of first hearing.

The arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The award of the Arbitrator shall be final conclusive and binding on all parties to this contract.

In the event of disputes or differences arising between one public sector enterprise and a Govt. department or between two public sector enterprise the above stipulations shall not apply, the provisions of BPE office memorandum No. BPE/CL 001/76 MAN /2 (1.10) 75-BPE (GM-1) dated 1st January 1976 or its amendments for arbitration shall be applicable."

It is the case of the applicant that on January 30, 1998, an application was made to refer the matter to arbitrator and Mr. Iyengar was appointed as sole arbitrator on April 11, 1998. The case of the applicant, however, is that after retirement, Mr. Iyengar was shifted to Bangalore, and he did not enter into arbitration proceedings. In these circumstances, the applicant issued a notice to the opposite party on January 27, 1999 which is annexed to the petition wherein it was stated

that as per Arbitration Clause 2.14, General Manager of the opponent had to appoint a qualified person as arbitrator. Said notice was received by the opposite party on January 30, 1999. Inspite of service of notice, there was failure on the part of the opponent in appointing arbitrator. Hence, the present petition is filed.

On March 12, 1999, notice was issued which was made returnable on April 9, 1999. Thereafter, the matter was adjourned from time to time. In fact, earlier, inspite of service to the opponent, nobody appeared. Last chance was, therefore, granted. On October 15, 1999, other side appeared and prayed for time. Time was granted and today, I have heard the parties.

Mr. Jani for the applicant submitted that the provisions of Section 11 (4) of the Act have been violated by the opponent as he failed to appoint arbitrator within 30 days from receipt of notice. As stated above, notice was issued on January 27, 1999 which was received on January 30, 1999.

Relying upon various authorities of the Supreme Court as well as of other High Courts, it was submitted that the Chief Justice can exercise powers under Section 11 of the Act. My attention was invited to the following decisions:

(1) M/s Meryfur Industries Ltd. vs. Union of India, 1998 Arb.W.I.J. 430;

(2) Union of India and another vs. M/s Amarnath Aggarwal Construction Pvt. Ltd. 1988 (2) SCC 337;

(3) K.C. Sharma vs. D.P.A. , AIR 1998 Delhi 235;

(4) Nandyal Coop. Spg. Mills Ltd. K.V.Mohan Rao, (1993) SCC 654.

Learned counsel Ms Parikh, for the other side, submitted that one Mr Mahadevan may be appointed as arbitrator. She, however, did not dispute that notice issued by the petitioner on January 27, 1999 was received by the respondent on January 30, 1999. Thus, there was default on the part of the opponent in appointing arbitrator within stipulated period. In these circumstances, in my opinion, the application deserves to be granted.

It was prayed by Mr. Jani that Honourable Mr. P.M.Chauhan or any other retired Judge, may be appointed. In the facts and circumstances of the case,in my opinion, the petition deserves to be allowed and as suggested by the applicant, Mr. P.M.Chauhan is appointed as arbitrator. Accordingly, petition stands disposed of. No costs. Arbitrator will decide venue and make an award in accordance with law.

Petition is accordingly allowed. No costs.

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parekh